No. 87-160

IN THE

SUPREME COURT OF THE UNITED STATES

****

OCTOBER TERM, 1987

****

WILLIAM F. GRANT, Superintendent,

Petitioner,

-vs-

ROBERT E. CASPER,

Respondent.

ON APPEAL TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE CASE

The deceased in this case died as a result of a gunshot wound admittedly inflicted by David Bunker at a time when Respondent Robert Casper was a passenger in a car being driven by Bunker. There was no proof or attempt to prove at trial that anyone other than Bunker had fired the fatal shot.

Contrary to the prosecution's allegation in its statement of the case, Respondent was charged not just with felony murder but with first-degree murder on alternate theories of premeditated murder and felony murder.

Intent was the major issue at trial as to both Respondent and Bunker. Contrary to the prosecution's claim in its statement of the case, the trial prosecutor argued in closing argument that Bunker had wilfully and deliberately shot the deceased and, in response to Respondent's trial counsel's argument that Respondent had merely been present, that Respondent had knowingly and intentionally participated in an armed robbery attempt.

The trial judge's instructions to the jury contained a lengthy, gross Sandstrom [v Montana, 442 US 510 (1979),] error that, in the context of this case, seriously undermined the integrity of the jury's fact-finding role. The district court correctly found that the error was not harmless, and the Sixth Circuit correctly affirmed.

SUMMARY OF ARGUMENT

The decision below was clearly correct as a matter of well-settled law. The issue raised by the prosecution is not one as to which there is a conflict among the circuits, nor is this otherwise an appropriate case for reviewing the retroactivity of Sandstrom v Montana, supra. The retroactivity ruling of the Sixth Circuit in this case was also fully in accord with retroactivity

principles currently applied in this Court. The issue of retroactivity was also waived in this matter for the reason that no response to Respondent's petition was ever filed, and the issue was first raised by Petitioner only after the issuance of the Magistrate's Report and Recommendation.

REASONS FOR DENYING THE PETITION

Each court of appeals that has considered the retroactivity of Sandstrom, supra, has held that it is to be given full retroactive effect. Contrary to the position taken by the prosecution, there is no conflict to be resolved here.

The decision below was a correct application of existing retroactivity law. The instructional error here -- a lengthy and clearly burden-shifting instruction -- undermined the integrity of the jury's decision-making process. On the particular facts of this case, the error must cause any reviewing court to question the likelihood that a properly instructed court would have arrived at a similar decision as to Respondent. Cf., e.g., United States v Johnson, 457 US 537, 564 (1982), White, J., dissenting. Further, Sandstrom did not represent a clear break with past holdings, for it was foreshadowed as early as In re Winship, 397 US 358 (1970). Cf., e.g., McBee v Grant, 763 F2d 811, 816 (6th Cir 1985) (cause and prejudice test of Wainwright v Sykes, 433 US 72 (1977), held not met where Sandstrom-violative instructions not objected to at trial occurring after decision in Winship); Cook v Foltz, 814 F2d 1109 (6th Cir 1987).

See also Griffith v Kentucky, 479 US ____ (1987), Rehndquist, C.J., dissenting; Mackey v United States, 401 US 667, 691-695 (1971), Harlan, J., concurring.

The issue of retroactivity is also not properly before this Court. It was not raised by Petitioner in the district court until after issuance of the Magistrate's Report and Recommendation.

RELIEF REQUESTED

For all the reasons stated below, the petition should be denied.

Respectfully submitted,

KENNETH M. MOGILL P17865
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962-7210

July 16, 1987

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CERTIFICATE OF SERVICE BY MAIL

I, Kenneth M. Mogill, a member of the Bar of the Supreme Court of the United States and a counsel of record for Robert E. Casper, Respondent herein, hereby certify that on July 16, 1987, pursuant to Supreme Court Rule, I served three copies of Respondent's Motion for Leave to Proceed in Forma Pauperis and Brief in Opposition to Petition for Writ of Certiorari on each of the parties herein as follows:

On William A. Dardy, attorney of record for Petitioner herein, by depositing such copies in the United States Post Office in Detroit, Michigan with first class postage prepaid, properly addressed to William A. Dardy, Assistant Prosecuting Attorney, Macomb County Court Building, 40 North Gratiot, Sixth Floor, Mt. Clemens, Michigan 48043.

On Clerk of the United States Supreme Court by depositing such copies in the United States Post Office in Detroit, Michigan with first class postage prepaid, properly

addressed to Joseph F. Spaniol, Jr., Clerk of the United States Supreme Court at the Supreme Court of the United States, Washington, D.C. 20543.

All parties required to be served have been served.

KENNETH M. MOGILL

Dated: July 16, 1987

Subscribed and sworn to before me
this 16th day of July, 1987

BONNIE J. LaLIBERTE, Notary Public,
Macomb County acting in
Wayne County, Michigan
My Commission Expires 3-19-90